Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

ARVIL RAY RATLIFF,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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61pp

QUESTION PRESENTED FOR REVIEW

Did the Supreme Court of Virginia err in failing to recognize that Petitioner's due process rights were violated by the decision of the Court of Appeals of Virginia to deny Petitioner's Petition for Appeal on the grounds that, as a matter of law, he could not be prosecuted under Va. Code Ann. § 18.2-112, even though only one month prior to the denial of the Petition for Appeal in this case, the Court of Appeals had granted Petitioner's Petition for Appeal on the identical legal issue in a related case and ultimately reversed Petitioner's conviction in the prior case following the order of the Supreme Court of Virginia denying the Petitioner's Petition for Rehearing in this case?

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OPINIONS BELOW

The Court of Appeals of Virginia issued an order denying Petitioner's Petition for Appeal to the Court of Appeals on August 9, 1994, which is set forth in the Appendix at A-3. The Supreme Court of Virginia denied Petitioner's subsequent Petition for Appeal to the Supreme Court in the same case on January 17, 1995 (A-2). On March 3, 1995, the Supreme Court of Virginia denied Petitioner's Petition for Rehearing (A-1).

In a separate criminal proceeding arising out of the same indictment giving rise to the convictions in this case, the Court of Appeals granted Petitioner's Petition for Appeal on one of the very same issues raised in this case on July 6, 1994 (A-29). On March 21, 1995, the Court of Appeals reversed Petitioner's conviction for felonious misuse of public funds in his custody in violation of Va.

Code Ann. § 18.2-112 because, as a matter of law, Petitioner did not have custody of the funds allegedly embezzled (A-18). Ratliff v. Commonwealth, 20 Va. App. 43, 455 S.E.2d 259 (1995).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The final disposition of this case below was the Supreme Court of Virginia's decision denying Petitioner's Petition for Rehearing on March 3, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution states in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

The Petitioner, Arvil Ray Ratliff, a former member of the Buchanan County Board of Supervisors, was indicted by a grand jury in Buchanan County on October 29, 1991, on two counts of felonious misuse of public funds in his custody in violation of Va. Code Ann. § 18.2-112 (Indictment Nos. 419-91, 420-91). The charges arose out of Petitioner's execution and submission of vouchers for travel reimbursement. He was also charged with two misdemeanor counts of fraudulently issuing bills for services not performed under V.C.A. § 18.2-471 (Indictment Nos. 431-91, 432-91), and two misdemeanor counts of fraudulent entries by a public official under V.C.A. § 18.2-472 (Indictment Nos. 442-91, 443-91). The trial was bifurcated according to the time of the alleged offenses.

On March 29 and 30, 1993, Ratliff was tried before a jury on Indictment Nos. 419-91, 431-19, and 442-19, concerning offenses alleged to have taken place in October 1990, in the Buchanan County Circuit Court, with the Honorable Nicholas E. Persin presiding. The court denied Ratliff's motion for acquittal on all charges at the close of the Commonwealth's evidence. The jury returned verdicts finding Ratliff guilty on the charge in Indictment 419-91 charging felonious misuse of public funds, but found him not guilty on the misdemeanor charges.

On April 1 and 2, 1993, Ratliff was then tried in the same court on Indictment Nos. 420-91, 432-91, and 443-91, concerning offenses alleged to have taken place in July 1990. At the close of the Commonwealth's evidence, and again at the close of all evidence, Ratliff moved to

dismiss and to strike as to all of the charges, but his motions were denied. The jury then found Ratliff guilty on all three charges. Ratliff's motion to set aside the guilty verdicts and for a judgment of acquittal as to all charges in both trials was denied.

Ratliff filed a Petition for Appeal with the Court of Appeals of Virginia as to his conviction in the first trial. On July 6, 1994, this Petition was granted as to the felony conviction under V.C.A. § 18.2-112 on the alleged ground that the evidence was insufficient to show that Petitioner had custody and control of funds as required by the statute (A-29).

Ratliff then filed a Petition for Appeal with the Court of Appeals of Virginia in the second trial, which Petition is the subject of the instant Petition for Writ of Certiorari. Although the second Petition raised issues identical

to those set forth in the first Petition, since the legal issues and the evidence presented were the same in both proceedings, the Court of Appeals denied the Petition in toto on August 9, 1994 (A-3). Of relevance to this proceeding, the Court of Appeals stated that

> [t]he evidence thus established appellant knowingly submitted travel vouchers without regard to their accuracy, and received payment from public funds pursuant to those vouchers. This was sufficient to support the charge and conviction of a violation of Code § 18.2-112.

(A-14.) However, the Court of Appeals did not address the legal issue of whether Petitioner could have custody of the funds allegedly embezzled, which issue it had deemed worthy of appeal only one month earlier.

Following the Court of Appeals' denial of the Petition for Appeal in the second trial, the Supreme Court of Virginia denied Petitioner's Petition for

Appeal to the Supreme Court on January 17, 1995 (A-2). Thereafter, the Supreme Court of Virginia denied Petitioner's Petition for Rehearing on March 3, 1995 (A-1). Following Petitioner's exhaustion of his appellate remedies on the second trial, the Court of Appeals of Virginia issued an opinion in the first trial reversing the felony conviction on the grounds that

> because Ratliff did not have custody of the public funds he allegedly embezzled, the evidence presented by the Commonwealth was insufficient to sustain his conviction for violating Code § 18.2-112.

Ratliff v. Commonwealth, 20 Va. App. 43, 455 S.E.2d 259, 261 (1995) (A-28).

ARGUMENT

IN FAILING TO GIVE PETITIONER'S PETITION FOR APPEAL IN HIS SECOND TRIAL DUE CONSIDERATION, AND IN ISSUING TWO WHOLLY INCONSISTENT ORDERS IN TWO RELATED CASES ONLY ONE MONTH APART FROM ONE ANOTHER, THE COURT OF APPEALS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS ON APPEAL.

This Court has reiterated on many occasions the well-established rule that although the Constitution does not require the states to grant criminal appeals as of right, McKane v. Durston, 153 U.S. 684 (1894), once a state creates a system of appeals, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." Evitts v. Lucey, 469 U.S. 387, 393 (1985); see, e.g., Douglas v. California, 372 U.S. 353 (1963) (right to counsel on direct appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (right to transcript on direct appeal). These fourteenth amend-

ment protections "appl[y] to appellate review of criminal convictions with the same vigor as they appl[y] to the trial of criminal cases." Donnell v. Swenson, 258 F. Supp. 317, 323 (W.D. Mo. 1966), aff'd, 382 F.2d 248 (8th Cir. 1967). A criminal defendant is afforded no lesser guarantee of due process where the state system provides for discretionary appeal, as in Virginia, than where appeal is automatic. See, e.g., Billotti v. Legursky, 975 F.2d 113 (4th Cir. 1992), cert. denied, 113 S. Ct. 1578 (1993) (West Virginia); Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987) (New Hampshire). The appropriate due process inquiry is whether a criminal defendant is provided "'an adequate opportunity to present [his] claims fairly within the adversary system.'" Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (quoting Ross v. Moffit, 417 U.S. 600, 612 (1974)).

At a minimum, due process demands an appeal that is "adequate and effective." Griffin v. Illinois, supra, 351 U.S. at 20. In other words, an appellate system must assure a criminal defendant "a fair opportunity to obtain an adjudication on the merits of his appeal." Evitts v. Lucey, supra, 469 U.S. at 405. In a system providing for discretionary review, that "fair opportunity" is afforded only where the appellate courts give due consideration to the issues presented by the petition for appeal and where such careful evaluation results in consistent application of rules of law to similar situations. The fundamentals of due consideration and consistency were clearly lacking in the Virginia Court of Appeals' assessment of Petitioner's second Petition for Appeal in this matter. The manifest harm caused Petitioner by the court's disdain for due process is ap-

parent in the uneven result that his felony conviction for activity distinguishable only by the date on which it allegedly transpired in the first trial has been reversed, while the conviction in the second trial stands, due to the failure of the court to address the merits of Petitioner's second appeal.

The Court of Appeals in this case was faced with two separate felony convictions arising out of the same alleged scheme to deprive the county of certain funds by submitting false travel vouchers. The only distinguishing features of the alleged criminal conduct were that those acts that the Commonwealth attempted to prove in the first trial occurred in October 1990, and the transactions covered by the second trial allegedly took place in July 1990. The evidence presented at the two back-to-back jury trials in late March and early

April 1993 was overlapping, and the same judge presided at both proceedings. More importantly, in both trials Petitioner was charged with and convicted of violating Va. Code Ann. § 18.2-112, which provides:

> If any officer, agent or employee of the Commonwealth or of any city, town, county, or any other political subdivision, or the deputy of any such officer having custody of public funds, or other funds coming into his custody under his official capacity, knowingly misuse or misappropriate the same or knowingly dispose thereof otherwise than in accordance with law, he shall be guilty of a Class 4 felony[.]

(Emphasis added.)

Following each of his felony convictions, Petitioner filed virtually identical Petitions for Appeal, arguing, inter alia, that his felony conviction should be reversed because the evidence at trial was not sufficient to show that he had custody and control of the funds allegedly embezzled, as required by V.C.A. §

18.2-112. One panel of the Virginia Court of Appeals recognized the potential error of convicting Petitioner under this statute and granted an appeal on this legal issue. Thereafter, in a well-reasoned and insightful opinion, that panel concluded that Petitioner's conviction must be reversed because, as a member of the Board of Supervisors, Petitioner did not have custody or control of the funds alleged to have been embezzled.

However, due to its failure to carefully consider Petitioner's appeal, the panel assigned to consider Petitioner's second Petition for Appeal failed to address or even recognize the legal issue raised in the Petition, i.e., notwithstanding evidence that Petitioner knowingly submitted false travel vouchers, he could not be convicted of an offense under V.C.A. § 18.2-112 because he

did not have custody or control over the funds which he allegedly obtained unlawfully. Instead, the panel treated the issue, which was discussed at length in the Petition for Appeal, as merely a question of sufficiency of the evidence, stating:

> The evidence thus established appellant knowingly submitted travel vouchers without regard to their accuracy, and received payment from public funds pursuant to those vouchers. This was sufficient to support the charge and conviction of a violation of Code § 18.2-112.

(A-14.) The Supreme Court of Virginia followed suit, resulting in the paradox that Petitioner's conviction in the second trial was affirmed without addressing the merits and without any further right of appeal just prior to the issuance of the Court of Appeals' decision reversing Petitioner's first conviction because the statute was improperly applied to Petitioner.

This harsh result is made all the more discomfiting by the fact that where the Court of Appeals gave the Petition for Appeal due consideration and, thus, provided Petitioner with a fair opportunity to have his appeal adjudicated on the merits, the court ultimately adopted Petitioner's argument, he prevailed, and his conviction was reversed. However, where, as so obviously occurred in the action that is the subject of this Petition for Writ of Certiorari, the Court of Appeals failed to carefully consider the legitimate legal issue raised in the Petition for Appeal, he was denied an adequate and effective appeal on the merits, and his conviction was finalized.

Due process must not tolerate this inconsistency in adjudication due solely to the court's failure to treat the appeal with serious consideration.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for the
Petitioner

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COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 3rd *day of* March, 1995.

Arvil Ray Ratliff, Appellant,

against Record No. 941546
Court of Appeals No. 1904-94-3

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 17th day of January, 1995 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 17th *day of* January, 1995.

Arvil Ray Ratliff, Appellant,

against Record No. 941546
Court of Appeals No. 1904-93-3

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach

By: *a.a.a.*
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 9th *day of* August, 1994.

Arvil Ray Ratliff, Appellant,

against Record No. 1904-93-3
Circuit Court Nos. 420-91,
432-91 and 443-91

Commonwealth of Virginia, Appellee.

From the Circuit Court of Buchanan County

Before Chief Judge Moon, Retired Judges Penn and Snead*

This petition for appeal is denied for the following reasons:

"On appeal, we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987).

I. The indictments in Case Nos. 432-91 and 443-91 specifically referred to appellant's position as "a member of

the Buchanan County Board of Supervisors" and "a public official of Buchanan County." The provisions of the Code which appellant was charged with violating are directed specifically at wrongdoing by public officers or those charged with the public trust. Code § 18.2-471 prohibits "any person authorized by law to charge fees for services performed by him" from "fraudulently issu[ing] a fee bill for a service not performed by him, or for more than he is entitled to." Code § 18.2-472 prohibits "a clerk of any court or other public officer" from "fraudulently mak-[ing] a false entry . . . [in] any record . . . in his keeping and belonging to his office." If found guilty under either section, the person "shall forfeit his office and be forever incapable of holding office of honor, profit or trust under the Constitution of Virginia."

Under Code § 19.2-8, there is a two-year statute of limitations for prosecutions of "nonfelonious offenses which constitute malfeasance in office." "Under established principles we note that '[n]ontechnical words in statutes are taken to have been used in their ordinary sense and acceptation." Smith v. Commonwealth, 3 Va. App. 650, 655, 353 S.E.2d 159, 161 (1987) (citations omitted). As commonly defined, "malfeasance" is synonymous with "wrongdoing," particularly by public officers under color of the authority of their office. See Webster's Third New International Dictionary 1367 (1981).

Appellant was indicted within two years of the date upon which he submitted fraudulent travel vouchers in order to receive reimbursement for travel expenses allegedly incurred in the course of his duties as a public officer of Buchanan

County. Accordingly, we cannot say the trial court erred by denying appellant's motion to quash the indictments as time-barred.

II. The record demonstrates that prosecution of these cases was continued on appellant's motion or by joint motion of the parties from February 3, 1992 through October 1992. Pursuant to Code § 19.2-243, these periods of time are excluded from the nine month period within which prosecution must begin.

The record also reflects appellant filed a Motion to Dismiss and to Quash Indictments on October 9, 1992, and a hearing was scheduled for December 16, 1992.

> [W]hen a defendant has shown that he or she has not been brought to trial within the statutory period, the Commonwealth has the burden to satisfactorily explain the delay . . . . Any period of delay in bringing the defendant to trial, however, which is attributable to the defendant

> will not be counted in determining whether the Commonwealth complied with the statutory speedy trial mandate.

Taylor v. Commonwealth, 12 Va. App. 425, 428, 404 S.E.2d 86, 87-88 (1991). The period during which appellant's Motion to Dismiss and Quash Indictments was under consideration is attributable to appellant. Accordingly, there was no error by the trial court in denying appellant's motion to dismiss for violation of his right to a speedy trial. Cantwell v. Commonwealth, 2 Va. App. 606, 610, 347 S.E.2d 523, 525 (1986).

III. Code § 19.2-155 authorizes the appointment of an attorney-at-law on behalf of the Commonwealth under certain circumstances when the Commonwealth's Attorney of any county or city is unable to properly perform his or her duties. Code § 19.2-155 expressly provides that such an appointed attorney-at-law for the Commonwealth "shall act in place of, and

otherwise perform the duties and exercise the powers of, such disqualified or disabled attorney for the Commonwealth."

On appeal, appellant has not challenged the procedures by which substitute counsel was appointed for the Commonwealth, but argues that Code § 19.2-214 nonetheless requires preparation of the bill of indictment by the Commonwealth's Attorney. However, "[s]tatutes must be construed consistently with each other and so as to reasonably and logically effectuate their intended purpose." Nelson v. County of Henrico, 10 Va. App. 558, 561, 393 S.E.2d 644, 646 (1990). Appellant's interpretation of Code § 19.2-214 would eviscerate the ability of the Commonwealth to proceed against individuals when, as here, it is improper or impossible for the attorney for the Commonwealth to prosecute the case. Such an

interpretation is neither reasonable or logical.

Accordingly, appellant has failed to demonstrate reversible error in the preparation of the bill of indictments by the special appointed counsel for the Commonwealth.

IV. "It is within the trial judge's discretion to determine whether he harbors bias or prejudice which will impair his ability to give the defendant a fair trial." Terrell v. Commonwealth, 12 Va. App. 285, 293, 403 S.E.2d 387, 391 (1991). Judicial familiarity with a party through prior proceedings is not sufficient to establish bias. Kemph v. Commonwealth, 17 Va. App. ___, ___, 437 S.E.2d 210, 214 (1993).

Appellant has not pointed to any specific instances in the record where the trial judge demonstrated bias or prejudice against appellant so that ap-

pellant was denied a fair trial. The fact that the trial judge was involved in a judicial capacity in earlier stages does not, without more, demonstrate bias or prejudice against appellant.

Therefore, we cannot say appellant has demonstrated by the record an abuse of the trial court's discretion in the denial of appellant's motion to recuse.

V. and VI. "An appellant must demonstrate that the excluded evidence is relevant and material and that the party was entitled to have it introduced in order to establish on appeal that the trial court erred by excluding it." Toro v. City of Norfolk, 14 Va. App. 244, 254, 416 S.E.2d 29, 35 (1992). Appellant has failed to demonstrate reversible error by the trial court in limiting the extent to which he could elicit testimony of similar wrongdoing by other members of the Buchanan Board of Supervisors as a de-

fense for his own malfeasance and from attempting to demonstrate selective prosecution.

The trial court properly noted that it was no defense for appellant if other supervisors received reimbursements contrary to law. "If [appellant's] conduct was in accordance with the law, it did not need to be supported by the practice of others; if it was not in accordance with the law, the fact that others violated the law would furnish no justification or excuse to him." Robinson v. Commonwealth, 104 Va. 888, 893, 52 S.E. 690, 692 (1906).

While appellant alleged the testimony would demonstrate he had no criminal intent, under Code § 18.2-112 the Commonwealth was required to prove only that appellant knowingly received travel reimbursements in a manner contrary to law, not that he intended to defraud. Crider

v. Commonwealth, 206 Va. 574, 579-80, 145 S.E.2d 222, 226 (1965). "The essence of the crime is the scienter, the guilty knowledge of the [appellant] that these payments obtained by [appellant] . . . were a misuse or misappropriation of public funds, or a disposition of them not in accordance with law." Id. at 579, 145 S.E.2d at 226. Moreover, the jury heard testimony from other witnesses, including a member of the Board of Supervisors, concerning the prior practice of reimbursing supervisors' travel expenses before that method's legality was questioned and the procedures changed.

Similarly, appellant has not demonstrated that the trial court erred in limiting his defense of selective prosecution. To the extent appellant raises an argument that his rights to equal protection under either the United States or Virginia Constitutions were violated, we

hold that that argument was not raised below and therefore will not be considered for the first time on appeal. Jacques v. Commonwealth, 12 Va. App. 591, 593, 405 S.E.2d 630, 631 (1991)(citing Rule 5A:18).

The record demonstrates appellant was allowed to present evidence in his defense, but was not allowed to expand the case beyond the issues relevant to his own trial. Accordingly, appellant has not demonstrated reversible error.

VII. Viewing the evidence in the light most favorable to the Commonwealth, there was sufficient evidence to find appellant guilty beyond a reasonable doubt of violating Code § 18.2-112. The witnesses testified that appellant signed mileage vouchers seeking reimbursements for travel expenses without providing any information regarding miles actually traveled. The witnesses' testimony also

established that the mileage vouchers signed by appellant were paid by check warrants from funds appropriated and approved by the Board of Supervisors. Sandy Boyd testified that sometime before she left her position in September 1989 she spoke to the supervisors, including appellant, and indicated they should record the miles actually traveled. She also provided each supervisor with a notebook in which to record their miles.

The evidence thus established appellant knowingly submitted travel vouchers without regard to their accuracy, and received payment from public funds pursuant to those vouchers. This was sufficient to support the charge and conviction of a violation of Code § 18.2-112.

Accordingly, there was no error in the trial court denying appellant's motion to strike.

VIII. In his first trial, appellant was convicted of violating Code § 18.2-112 and acquitted of violations of Code §§ 18.2-471 and -472 purported to have occurred "on or about October 1, 1990." In the second trial, appellant was charged and convicted with violating Code §§ 18.2-471 and -472 "on or about July 10, 1990."

As "[t]he party seeking the protection of collateral estoppel [appellant] carries the burden of showing that the verdict in the prior action necessarily decided the precise issue he seeks to now preclude." Rogers v. Commonwealth, 5 Va. App. 337, 341, 362 S.E.2d 752, 754 (1987).

> The doctrine of collateral estoppel in criminal cases is embodied in the fifth amendment protection against double jeopardy and means "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between

> the same parties in any future lawsuit."

Id., 362 S.E.2d at 754 (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)). The trial court is required to determine, based upon the record, "'whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" Rogers, 5 Va. App. at 341, 362 S.E.2d at 754 (quoting Ashe).

In light of appellant's felony conviction in the previous trial, the trial court determined that the jury's acquittals could have been grounded on an issue other than that for which appellant sought collateral estoppel. While the evidence relied upon in the two trials was much the same, it was not identical. Appellant was charged with and convicted of acts occurring on about July 10, 1990. The Commonwealth produced evidence prov-

ing the submission of fraudulent travel vouchers for that date.

Accordingly, we cannot say the trial court erred in denying appellant's motion to dismiss the misdemeanor indictments on the grounds of collateral estoppel.

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*Retired Judges Carleton Penn and Rayner V. Snead took part in the consideration of this case by designation pursuant to Code § 17-116.01.

A Copy,

Teste:

Richard R. James, Clerk

By: *Marty K.P. Ring*
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 21st *day of* March, 1995.

Arvil Ray Ratliff, Appellant,

against Record No. 1903-93-3
Circuit Court No. 419-91

Commonwealth of Virginia, Appellee.

From the Circuit Court of Buchanan County

Before Chief Judge Moon, Judges Barrow and Coleman

For reasons stated in writing and filed with the record, the Court is of opinion that there is error in the judgment appealed from. Accordingly, the judgment is reversed and annulled and the verdict of the jury is set aside.

This order shall be certified to the trial court.

A Copy,

Teste:

Richard R. James, Clerk

By: *Marty K.P. Ring*
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 21st *day of* March, 1995.

Arvil Ray Ratliff, Appellant,

against Record No. 1903-93-3
Circuit Court No. 419-91

Commonwealth of Virginia, Appellee.

From the Circuit Court of Buchanan County

Before Chief Judge Moon, Judges Barrow and Coleman

OPINION

Appellant, Arvil Ray Ratliff (Ratliff), was convicted in a jury trial in Buchanan County of felonious misuse of public funds in his custody, a violation of Code § 18.2-112. On appeal, Ratliff contends the evidence was insufficient to prove a violation of Code § 18.2-112 because he did not have custody of the funds allegedly embezzled. We hold that because the Commonwealth failed to show

that Ratliff had custody of the funds within the meaning of the statute, the evidence was insufficient to prove a violation of Code § 18.2-112. Accordingly, we reverse Ratliff's conviction.

In October, 1990, Ratliff, who was a member of the Board of Supervisors, signed and submitted a mileage voucher for payment for 2,196 miles he claimed to have traveled during the months of July, August and September.[1] Vouchers, like the one submitted by Ratliff, were prepared by a county clerk and were generated by a computer according to a system under which all board members were credited for mileage within a specified minimum and maximum that was set forth on a Rolodex card. The system specified that vouchers were to be submitted to the

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[1]This case arises out of Ratliff's submission of these vouchers and his obtaining of funds as reimbursement for travel.

board for approval by a vote of the entire board, after which the board's bookkeeper prepared a warrant for payment. The warrant would then be signed by the County Administrator on behalf of the board and submitted to the County Treasurer. The County Treasurer would then issue a check payable to the board member.

At trial, the evidence proved that the reimbursement check made out to Ratliff pursuant to his mileage voucher was drawn on the Buchanan County general fund. Ratliff had no authority over the account and could not remove funds from it. The County Treasurer had custody of the funds and maintained the account. The Treasurer's signature was necessary to make the check negotiable. Although the Treasurer could not draw on county funds unless the Board of Supervisors had made an appropriation, the board itself

could not withdraw funds from the account.

At the close of all of the evidence, Ratliff moved for acquittal of the charge under Code § 18.2-112 because, he argued, he did not have custody of the county funds. The trial judge overruled Ratliff's motion, finding that the statute did not require the "funds to come into the hands of the person who is charged with the misappropriation of funds."

Notwithstanding the trial court's interpretation of the statute, which is basically correct as a matter of law, we hold that Ratliff did not have custody of the county funds because he had neither the authority to draw checks on the account nor the authority to cause checks to be drawn on the account.

Code § 18.2-112, which is entitled, "Embezzlement by officers, etc. of public

or other funds," provides in pertinent part:

> If any officer, agent or employee of the Commonwealth or of any city, town, county, or any other political subdivision, or the deputy of any such officer having custody of public funds, or other funds coming into his custody under his official capacity, knowingly misuse or misappropriate the same or knowingly dispose thereof otherwise than in accordance with law, he shall be guilty of a Class 4 felony....

(Emphasis added.) An essential element of Code § 18.2-112 is the custody of the funds that are misappropriated. As with other embezzlement statutes, Code § 18.2-112 emphasizes the conversion of property by someone in a position of trust who, by virtue of their position, exercises control over the property converted or has custody of the property. See Code § 18.2-111.[2]

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[2]Embezzlement is the fraudulent appropriation of property by one lawfully entrusted with its possession. Two of the elements of embezzlement are that

While the term "custody" is not expressly defined within the statute, case law supports the proposition that it is not limited to cases of actual possession. See Crider v. Commonwealth, 206 Va. 574, 145 S.E.2d 222 (1965).[3] However, if a person charged with an offense under Code § 18.2-112 does not physically possess the property, the term custody requires proof that the person

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there must be a relationship such as that of employment or agency between the owner of the money and the defendant and that the money alleged to have been embezzled must have come into the possession of the defendant by virtue of that relationship. See Black's Law Dictionary 522 (6th ed. 1990).

[3]There are other embezzlement cases affirming convictions under Code § 18.2-112 or its predecessors which have dealt with defendants who were in physical possession of public funds. See Robinson v. Commonwealth, 104 Va. 888, 52 S.E. 690 (1906) (justice of peace who was paid a find but failed to pay it over to the county was found guilty of embezzlement); Orr v. Commonwealth, 2 Va. App. 371, 344 S.E.2d 627 (1986) (employee of county treasurer's office who stole cash under her supervision and control was properly convicted of violating Code § 18.2-112).

had the authority to dispose of or distribute the funds.[4]

In Crider, a town treasurer was convicted under the predecessor of Code § 18.2-112 because she paid herself for overtime work without approval of the town manager according to the town personnel plan with which she was familiar. These expenditures were not authorized by the council of the town or by its city manager. The amounts of unauthorized overtime pay were included in four payroll checks, all made payable to the defendant, two signed by the defendant and two by the assistant direct of finance. Id. at 575-76, 145 S.E.2d at 223-24. While the Supreme Court did not specifically address the issue of custody, it held that the evidence introduced was

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[4]Custody is generally defined as having the care and control of a thing. See Black's Law Dictionary 384 (6th ed. 1990).

sufficient to submit to the jury the issue of whether the defendant violated the statute. Id. at 578, 145 S.E.2d at 225. Thus, because the defendant in Crider caused funds to be paid to her without authority by means over which she had control, the town payroll, she was guilty of an offense under Code 18.2-112 even though she did not physically possess the funds.

However, the present case is unlike Crider and the other cases cited in note 3, supra, because Ratliff had neither physical possession of the funds nor control over the means with which to dispose of or disperse the funds. Ratliff, as a member of the Board of Supervisors, had no personal control over the general fund from which he received the reimbursement for his mileage voucher. Ratliff could not draw funds from the general fund account, nor could he, himself, cause a

member of the Treasurer's office to write checks on the account. At best, the Commonwealth's evidence proved that Ratliff fraudulently submitted vouchers to the Board of Supervisors, whose approval was necessary for the reimbursement check to be issued.

Even if we were to hold as the Commonwealth urges that Ratliff's misappropriation of funds under Code 18.2-112 could have been accomplished through a joint act of the Board of Supervisors and the Treasurer's office, we would be precluded from affirming Ratliff's conviction. Although the Treasurer's authority may have been limited to converting the warrant (already prepared by the board's bookkeeper) to a negotiable check, and the board could be considered the decision-maker, having the discretion to approve certain expenditures of funds, see Code § 15.1-547, these facts do not

negate the fact that the Board of Supervisors is an entity in itself, separate and apart from the individuals who compose it. See Campbell County v. Howard & Lee, 133 Va. 19, 59, 112 S.E. 876, 888 (1922); Manly Manufacturing Co. v. Broaddus, 94 Va. 547, 552, 27 S.E. 438, 440 (1897). Therefore, Ratliff, as an individual member of the board, did not have custody of the funds even if the board's control amounted to "custody" under Code § 18.2-112.

Thus, because Ratliff did not have custody of the public funds he allegedly embezzled, the evidence presented by the Commonwealth was insufficient to sustain his conviction for violating Code § 18.2-112.

Reversed.

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday *the* 6th *day of* July, 1994.

Arvil Ray Ratliff, Appellant,

against Record No. 1903-93-3
Circuit Court No. 419-91

Commonwealth of Virginia, Appellee.

From the Circuit Court of Buchanan County

Before Chief Judge Moon, Retired Judges Penn and Snead*

This petition for appeal is granted in part and denied in part. An appeal is awarded to the petitioner from a judgment of the Circuit Court of Buchanan County dated September 13, 1993, as to the sole question:

VII. Whether the evidence was insufficient to prove violation of Code § 18.2-112 because petitioner did not have custody of funds allegedly embezzled.

Appeal bond or an irrevocable letter of credit in the amount of $500 shall be posted as required by Code § 8.01-676.1(B). The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal is denied for the following reasons:

"On appeal, we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987).

I. "As a general rule, '[m]oot questions are not justiciable and courts do not rule on such questions to avoid

issuing advisory opinions.'" In re Times-World Corp., 7 Va. App. 317, 323, 373 S.E.2d 474, 477 (1988)(citation omitted). Appellant was found not guilty of the charges in Case Nos. 431-91 and 442-91. thus, appellant's arguments regarding his indictment on these charges are now moot.

II. The record demonstrates that prosecution of these cases was continued on appellant's motion or by joint motion of the parties from February 3, 1992 through October 1992. Pursuant to Code § 19.2-243, these periods of time are excluded from the nine month period within which prosecution must begin. Accordingly, there was no error by the trial court in denying appellant's motion to dismiss for violation of his right to a speedy trial. Cantwell v. Commonwealth, Va. App. 606, 610, 347 S.E.2d 523, 525 (1986).

III. Code § 19.2-155 authorizes the appointment of an attorney-at-law on behalf of the Commonwealth under certain circumstances when the Commonwealth's Attorney of any county or city is unable to properly perform his or her duties. Code § 19.2-155 expressly provides that such an appointed attorney-at-law for the Commonwealth "shall act in place of, and otherwise perform the duties and exercise the powers of, such disqualified or disabled attorney for the Commonwealth."

On appeal, appellant has not challenged the procedures by which substitute counsel was appointed for the Commonwealth, but argues that Code § 19.2-214 nonetheless requires preparation of the bill of indictment by the Commonwealth's Attorney. However, "[s]tatutes must be construed consistently with each other and so as to reasonably and logically effectuate their intended purpose." Nelson

v. County of Henrico, 10 Va. App. 558, 561, 393 S.E.2d 644, 646 (1990). Appellant's interpretation of Code § 19.2-214 would eviscerate the ability of the Commonwealth to proceed against individuals when, as here, it is improper or impossible for the attorney for the Commonwealth to prosecute the case. Such an interpretation is neither reasonable nor logical.

Accordingly, appellant has failed to demonstrate reversible error in the preparation of the bill of indictments by the special appointed counsel for the Commonwealth.

IV. "It is within the trial judge's discretion to determine whether he harbors bias or prejudice which will impair his ability to give the defendant a fair trial." Terrell v. Commonwealth, 12 Va. App. 285, 293, 403 S.E.2d 387, 391 (1991). Judicial familiarity with a par-

ty through prior proceedings is not sufficient to establish bias. Kemph v. Commonwealth, 17 Va. App. ___, ___, 437 S.E.2d 210, 214 (1993).

Appellant has not pointed to any specific instances in the record where the trial judge demonstrated bias or prejudice against appellant so that appellant was denied a fair trial. The fact that the trial judge was involved in a judicial capacity in earlier stages does not, without more, demonstrate bias or prejudice against appellant.

Therefore, we cannot say appellant has demonstrated by the record an abuse of the trial court's discretion in the denial of appellant's motion to recuse.

V. and VI. "An appellant must demonstrate that the excluded evidence is relevant and material and that the party was entitled to have it introduced in order to establish on appeal that the trial

court erred by excluding it." Toro v. City of Norfolk, 14 Va. App. 244, 254, 416 S.E.2d 29, 35 (1992). Appellant has failed to demonstrate reversible error by the trial court in limiting him from calling other members of the Buchanan Board of Supervisors and from attempting to demonstrate selective prosecution.

The trial court granted the Commonwealth's motion in limine prohibiting appellant from calling other members of the Buchanan Board of Supervisors to testify, stating:

> [I]f I permit you to do it, what I'm really allowing [appellant] to do is to show that others did the same thing that he did, and if it were illegal, that ought to be some legal justification for him, and that would be totally misleading to the Jury and contrary to the law.

The trial court properly noted that it was no defense for appellant if other supervisors received reimbursements contrary to law. "If [appellant's] conduct

was in accordance with the law, it did not need to be supported by the practice of others; if it was not in accordance with the law, the fact that others violated the law would furnish no justification or excuse to him." Robinson v. Commonwealth, 104 Va. 888, 893, 52 S.E. 690, 692 (1906).

While appellant alleged the testimony would demonstrate he had no criminal intent, under Code § 18.2-112 the Commonwealth was required to prove only that appellant knowingly received travel reimbursements in a manner contrary to law, not that he intended to defraud. Crider v. Commonwealth, 206 Va. 574, 579-80, 145 S.E.2d 222, 226 (1965). "The essence of the crime is the scienter, the guilty knowledge of the [appellant] that these payments obtained by [appellant] . . . were a misuse or misappropriation of public funds, or a disposition of them not

in accordance with law." Id. at 579, 14 S.E.2d at 226. Moreover, the jury heard testimony from other witnesses concerning the prior practice of reimbursing supervisors' travel expenses before that method's legality was questioned and the procedures changed. Thus, any error in the trial court's refusal to allow appellant to call other supervisors was, at most, harmless.

Similarly, appellant has not demonstrated that the trial court erred in limiting his defense of selective prosecution. To the extent appellant raises an argument that his rights to equal protection under either the United States or Virginia Constitutions were violated, we hold that that argument was not raised below and therefore will not be considered for the first time on appeal. Jacques v. Commonwealth, 12 Va. App. 591,

593, 405 S.E.2d 630, 631 (1991)(citing Rule 5A:18).

The record demonstrates appellant was allowed to present evidence in his defense, but was not allowed to expand the case beyond the issues relevant to his own trial. Accordingly, appellant has not demonstrated reversible error.

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*Retired Judges Carleton Penn and Rayner V. Snead took part in the consideration of this case by designation pursuant to Code § 17-116.01.

A Copy,

Teste:

Richard R. James, Clerk

By: *Marty K.P. Ring*
Deputy Clerk

CERTIFICATE OF CLERK

I, Richard R. James, Clerk of the Court of Appeals of Virginia, do hereby certify that on July 6, 1994 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the trial court indicated in the order and to all counsel of record.

Given under my hand this 6th day of July, 1994.

Richard R. James, Clerk

By: *Marty K.P. Ring*

Deputy Clerk